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No. 93-1207

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

ESTHER A. GONZALES, LORENZO B. HOLQUIN, JR., RAUL HOLQUIN AND GLORIA CISNEROS,
Petitioners,

v.

RICHARD A. CARTER, D.O. AND E. R. JOHNSON, D.O.,
Respondents.

On Petition for Writ of Certiorari to the Second Court of Appeals District of Texas, Fort Worth, Texas

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the Texas state courts clearly err in holding that respondents' peremptory strikes were not purposefully discriminatory?

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RESPONDENTS' BRIEF IN OPPOSITION

The respondents, Richard A. Carter, D.O. and E. R. Johnson, D.O., respectfully request that this Court deny the petition for writ of *certiorari* seeking review of the opinion in this case issued by the Second Court of Appeals District of Texas, Fort Worth, Texas. Application for writ of error was denied by the Texas Supreme Court. The intermediate appellate court's opinion entered on June 9, 1993 was not published, but was reprinted in Appendix A to the Petition in this case.

STATEMENT OF THE CASE

Petitioners' sole complaint before this Court is that the Texas courts erred in finding respondents' peremptory strikes against two venire members, Steven Ayala and

Yvette Jimenez Baker were not racially motivated or intentionally discriminatory.

A. Proceedings in the State Courts.

After hearing testimony from respondents, the trial court determined that peremptory challenges exercised against Mr. Ayala and Mrs. Baker were not purposefully discriminatory. The state intermediate court of appeals affirmed the finding of no discriminatory intent in an unpublished opinion, and the Texas Supreme Court declined to hear the matter by denying petitioners' application for writ of error.

B. The Petition Misstates Crucial Facts.

1. Respondents did not fail to question the challenged jurors.

There are two crucial misstatements or mischaracterizations of fact in petitioners' brief before this Court. First, petitioners mistakenly represent that the two challenged venire members were not questioned during the voir dire proceeding. (Petition pp. 3, 5, 7, 13, 14) As the record reveals, questions were asked of *all* venire members. (S.F. 51-52, 73-77).[1] Petitioners misguidedly equate the absence of verbal responses from particular jurors with the absence of questions directed to those jurors. Furthermore, Mrs. Baker was specifically questioned regarding her employment and medical experience. (S.F. 27-28). Based on her answers, respondents feared Mrs. Baker's ability to remain impartial would be compromised by her employment and medical background. (S.F. 75).

Petitioners take a "smoke and mirrors" approach to their contention that Mrs. Baker was not specifically

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[1] Consistent with the briefing below, references to S.F. herein are to the transcript of the voir dire proceeding and *Batson* hearing. References to Tr. herein are to the record of pleadings in the state trial and appellate courts.

questioned. They correctly point out that Mrs. Baker's comments related to her employment at Northeast Medical Clinic are not attributed to her by name in the statement of facts. (S.F. 27-28). They admit, however, that Mrs. Baker's juror information card, which is a part of the record, reveals that she is employed by Northeast Medical Clinic. (Petition pp. 5-6, Tr. 189) Respondents' explanation of strikes refers to the juror who "told us she currently works for Northeast Medical Clinic." (S.F. 75).

Nevertheless, petitioners imply throughout the petition that the comments made by Mrs. Baker related to her employment do not support respondents' race-neutral reasons for exercising a strike against her, presumably because the court reporter failed to attribute those comments to Mrs. Baker by name. In the hearing before the trial court, petitioners did not argue that respondents had attributed these comments to Mrs. Baker in error. Similarly, they do not expressly contend in this Court that the "unidentified" venire person's comments regarding attendance of medical classes and employment at Northeast Medical Center are not correctly attributed to Mrs. Baker. Instead, through implication and innuendo they seek to create an impression that respondents' counsel erroneously or pretextually relied on comments made by someone other than Mrs. Baker as the basis for striking Mrs. Baker.

2. ***The record supports respondents' race-neutral explanations.***

Secondly, petitioners assert there is "no record" to support respondents' race-neutral explanations, and there is "no justification for the absence of such a record." (Petition p. 17). There is, in fact, a transcript of the voir dire proceedings and of the testimony offered by respondents' counsel to support the racial neutrality of their peremptory strikes. The only thing "absent" from the record is any attempt by petitioners to meet their burden to prove discriminatory intent.

Petitioners did not question either Mr. Ayala or Mrs. Baker,[2] did not cross-examine respondents' counsel, did not testify regarding observations and perceptions of prospective jurors' responses or nonverbal behavior during the voir dire process, and did not argue that any venire persons had been treated disparately. (S.F. 72-78). Furthermore, they did not argue that respondents proffered reasons for the strikes were not specifically related to the case, that jurors were not questioned meaningfully, or that non-Hispanic persons with similar characteristics to the challenged jurors were not removed from the panel. Instead, petitioners sat silent, declining to cross-examine respondents' attorneys regarding their race-neutral explanations and failing to offer any controverting explanation or evidence. (S.F. 72-78).

It was not until after an adverse jury verdict, that petitioners complained the trial court had erred in finding respondents' strikes against Mrs. Baker and Mr. Ayala were not intentionally discriminatory. In fact, it is not possible to discern from the hearing transcript that petitioners did not accept respondents' explanations as race neutral at the conclusion of the hearing. They declined to cross-examine respondents' counsel and made no argument or attempt to persuade the trial court that respondents' reasons were motivated by race or were a pretext to disguise intentional discrimination. (S.F. 76-78). At the conclusion of respondents' race-neutral explanations, petitioners merely inquired when the evidence phase of the trial would begin. (S.F. 77).

C. The Trial Court Heard Credible Testimony That Respondents Did Not Discriminate.

At the trial court's invitation, respondents presented evidence of race-neutral reasons for the strikes against Mr. Ayala and Mrs. Baker. (Tr. 66-78). John Scully,

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[2] The entire venire was present in the hallway during the hearing on petitioners' *Batson* challenge and venire members were available for examination. (S.F. 66.)

counsel for respondent Dr. Carter, testified that Mr. Ayala failed to raise his hand when asked whether he could find for defendants if evidence established Drs. Carter and Johnson were not negligent. (S.F. 73-74). Mr. Scully also testified that he observed Mr. Ayala favor the petitioners' attorneys' questioning (S.F. 75). Mr. Scully explained that Mr. Ayala's unwillingness to confirm his ability to find for the defendants based on the evidence, coupled with his nonverbal behavior favoring petitioners' counsel created concern that Mr. Ayala would be partial to petitioners and prejudiced against respondents. (S.F. 73-74). Mr. Scully also testified that he was not aware that Mr. Ayala was Hispanic at the time that he exercised the strike, and that at the time of his testimony, he still did not know if Mr. Ayala is Hispanic. (S.F. 74).

Mr. Scully testified that Mrs. Baker was challenged because she stated during voir dire she had attended medical classes and currently worked at a medical clinic for doctors of allopathic rather than osteopathic medicine.[3] (S.F. 74-75). Mr. Scully explained that respondents are doctors of osteopathic medicine, and he was concerned that a juror who worked for an allopathic physician would not be fair to an osteopath.[4] (S.F. 75). He also testified

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[3] Doctors of allopathic medicine are commonly referred to by the designation M.D. Doctors of osteopathic medicine are referred to by the designation D.O.

[4] It is noteworthy that when questioned by *petitioners' attorney*, four prospective jurors responded that they had "a background or . . . expertise or experience with medicine." (S.F. 24.) One juror responded that he had served as a medic in Vietnam in 1962-64 but had no medical experience in the last 28 years. One juror, Mr. McNeal, had also served as combat medic. Mr. McNeal was ultimately excused for cause on unrelated grounds. (Tr. 46.) Mr. Baumbach testified that he worked for four doctors in California 24 years ago. Mr. Baumbach was not seated on the jury. (Tr. 78.) The record is silent as to whether a peremptory strike was exercised against him by either party. *See United States v. Bennett*, 928 F.2d 1548, 1552 (11th Cir. 1991). Juror Ausbie Benton volunteered that her husband is a registered nurse. (Tr. 28.) Respond-

Mrs. Baker reacted favorably to questioning by the petitioners' attorney during voir dire, and appeared to be sympathetic to the petitioners' view. He described his observation that Mrs. Baker did not favor questioning by Max Freeman, attorney for respondent Dr. Johnson. (S.F. 75). He also noted that the selected jury included minorities and that respondents exercised several peremptory strikes on venire members who were not minorities. (S.F. 75-76).

Mr. Freeman, attorney for respondent Dr. Johnson, confirmed the observations and testimony offered by Mr. Scully and testified that reiteration of his own testimony on the issues addressed by Mr. Scully would be duplicative. (S.F. 76-77). He testified to his additional observations that neither Mrs. Baker nor Mr. Ayala raised their hands when asked if they could distinguish between real life and lawsuit damages or if they could find for defendants if plaintiffs fail to carry their burden of proof. (S.F. 77). He testified that Mr. Ayala's and Mrs. Baker's failure to respond affirmatively to these questions caused him concern and were the bases of his strikes. (S.F. 77). He also testified that he was unaware that Mrs. Baker's jury card had been mailed to her in the name of "Jimenez." (S.F. 71-72).

D. Petitioners Did Not Present Evidence of Pretext or Discriminatory Intent.

Petitioners did not offer any rebuttal evidence. They did not cross-examine Mr. Scully or Mr. Freeman (S.F. 75-77), did not offer testimony of their own counsel and did not call any venire members to testify. They presented no argument that the explanations made by respondents were not race-neutral and no argument or evidence that

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ents exercised a peremptory strike against Mrs. Benton because of her close relationship to someone with medical knowledge. (Tr. 73.) In short, with the exception of the juror who was a medic in Vietnam more than 28 years ago, all jurors who expressed a connection with the medical profession were removed from the jury.

the proffered reasons were pretextual. Once respondents articulated race-neutral reasons for the strikes, petitioners were required to expressly indicate intent to pursue the *Batson* claim. *See United States v. Rudas*, 905 F.2d 38, 41 (2nd Cir. 1990). They did not, choosing instead to withhold their position from the trial court until after an adverse verdict was returned. (S.F. 77).

REASONS WHY THE PETITION SHOULD BE DENIED

I. PETITIONERS MERELY SEEK REVIEW OF STATE COURT FACTUAL DETERMINATIONS.

A party's challenge that his opponent has exercised peremptory challenges for racially motivated reasons is evaluated in three steps. *Batson v. Kentucky*, 476 U.S. 79, 96-98 (1986). Initially, the moving party must make a *prima facie* showing that the peremptory challenges in question were exercised based on race. The burden then shifts to the party exercising the strikes to articulate race-neutral reasons for the challenges. *Batson*, 476 U.S. at 94. Unless the proffered reasons are inherently discriminatory, they are deemed race-neutral. *Hernandez v. New York*, —— U.S. ——, 111 S. Ct. 1859, 1860 (1991). Finally, the trial court must determine if the moving party has met his burden to prove that the peremptory challenges were exercised in a purposefully discriminatory manner. *Batson*, 476 U.S. at 97-98; *U.S. v. Seals*, 987 F.2d 1102 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 155 (1993).

A. The State Court Assumed a *Prima Facie* Case.

In the instant case, only the third step of the analysis is at issue. The state appellate court below held that respondents' challenge to the first step of the analysis—establishment of a *prima facie* case—was waived when respondents voluntarily explained their peremptory challenges. (Petition Appendix A-3.)[5] "When the nonmov-

[5] Interestingly, the state appellate court reached this decision even though there is no competent evidence on the record that the challenged jurors are Hispanic. The trial judge merely took judi-

ant does everything that would be required of him if the movant had properly made out a *prima facie* case, the issue of whether the movant actually made a *prima facie* case becomes moot." (Appendix A-3.)

B. Respondents' Facially Race-Neutral Explanations Are Deemed Nondiscriminatory.

Similarly, no question is presented to this Court regarding the second step of the *Batson* analysis. Petitioners have not complained, before this or any other court, that respondents' explanations were not facially race-neutral. A court evaluating the racial-neutrality of an attorney's peremptory challenge explanation must assume that the proffered reasons for the challenges are true, and then determine if the challenges violate the equal protection clause as a matter of law. *Hernandez*, 111 S. Ct. at 1860. "At this step of the inquiry, the issue is the facial validity of the prosecutors' explanation. Unless a discriminatory intent is inherent in a prosecutor's explanation, the reason offered will be deemed race-neutral." *Id.* at 1866.

Mr. Scully and Mr. Freeman explained that respondents' peremptory strikes were exercised against Mr. Ayala and Mrs. Baker due to their nonverbal responses indicating an inability to find for the defendant irrespective of the evidence, Mr. Ayala's nonverbal predisposition to favor petitioners, and Mrs. Baker's employment in the medical field. (S.F. 76-78). These explanations are not inherently related to race and thus, were properly treated as race-neutral by the trial court.

C. Evaluation of Discriminatory Intent Is Purely a Question of Fact.

Petitioners offer two reasons *certiorari* should be granted. Both challenge the trial court's adherence to the third prong of the *Batson* analysis and complain that

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cial notice that the two challenged jurors had Hispanic surnames. (S.F. 71). *See United States v. Esparsen*, 930 F.2d 1461, 1467. (Surname alone is not sufficient to sustain a *Batson* challenge.)

it clearly erred in concluding petitioners failed to prove discriminatory intent. A trial court's determination that peremptory challenges were or were not racially motivated is purely a question of fact. *Hernandez,* 111 S.Ct. at 1860; *U.S. v. Pofahl,* 990 F.2d 1456, 1466 (5th Cir. 1993), *cert. denied,* 114 S.Ct. 560 (1993); *Soler v. Waite,* 989 F.2d 251 (7th Cir. 1993). Thus, petitioners seek this Court's discretionary review of state trial and appellate decisions based purely on questions of fact.

Certiorari should not be granted merely to review evidence and discuss specific facts. *United States v. Johnston,* 268 U.S. 220, 227 (1925). As this Court noted:

> "A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error."

Graver Tank & Mfg. Co., Inc. v. Linde Air Products Co., 363 U.S. 271, 275 (1949). Where determination of a case rests completely upon a question of fact and review of the facts would be of no importance except to the litigants themselves, *certiorari* should not be granted. *Rudolph v. United States,* 370 U.S. 269 (1977).

In the present case, respondents articulated facially race-neutral reasons for their strikes. Petitioners did not even attempt to controvert the explanations with any evidence or argument. The state trial court ruling that petitioners failed to prove purposeful discrimination was upheld by state appellate courts. The questions presented in the petition are purely questions of fact. Therefore, *certiorari* should be denied.

II. THE PETITION DOES NOT RAISE SUFFICIENTLY IMPORTANT ISSUES TO WARRANT REVIEW.

Petitioners complain that applying evidentiary standards adopted by Texas or other state courts, the trial court's finding of no purposeful discrimination was clearly

erroneous. Implicitly, petitioners suggest that this Court should grant *certiorari* to affirm evidentiary standards created and adopted by state courts to assess the legitimacy of race-neutral explanations, or alternatively, that this Court should establish such evidentiary standards. Neither argument is meritorious.

This Court has already spoken adequately on evaluating the validity of strike explanations and has wisely declined to formulate particular procedures to be followed when peremptory challenges draw objections. *Batson*, 476 U.S. at 99. Because jury selection practices vary widely among state and federal courts and among civil and criminal proceedings, great deference is accorded to trial courts to determine the best procedures to implement *Batson's* objectives. *Id.* Reviewing federal courts must respect the procedures formulated by state courts for denying *Batson* challenges. *Jones v. Jones*, 938 F.2d 838, 844 (8th Cir. 1991). Furthermore, evaluation must be based on the totality of relevant facts. *Batson*, 476 U.S. at 97; *Hernandez*, 111 S.Ct. at 1868. Accordingly, bright line rules regarding the determination of discriminatory intent are inappropriate and unhelpful. *See United States v. Clemons*, 941 F.2d 321 (5th Cir. 1991); *United States v. Alvarado*, 951 F.2d 22 (2nd Cir. 1991); *United States v. Peete*, 919 F.2d 1168, 1179 (6th Cir. 1990); *United States v. Sangineto-Miranda*, 859 F.2d 1501, 1521 (6th Cir. 1988).

Explanations for peremptory challenges must be neutral, related to the case to be tried, clear, reasonably specific, and legitimate. *Batson*, 476 U.S. at 97-99. The decisive question in a trial court's determination of discriminatory intent is whether counsel's race-neutral explanation for the peremptory challenge should be believed. Accordingly, factual determinations may be based upon the demeanor and credibility of the attorney who exercises the challenge. *Hernandez*, 111 S.Ct. at 1868. "Evaluation of an attorney's state of mind based on demeanor and credibility lies 'peculiarly within a trial

judge's province.'" *Id.* (citing *Wainwright v. Witt*, 469 U.S. at 412, 428 (1985)).

Thus, in *Batson* and *Hernandez*, this Court has already generally addressed the standards to be applied by the fact finder when evaluating the legitimacy and validity of race-neutral explanations for peremptory challenges and has correctly declined to adopt more specific procedures. 476 U.S. at 99; 111 S.Ct. at 1869. The Petition raises no new or important questions that warrant review.

III. THE COURTS BELOW FULLY CONSIDERED AND CORRECTLY DECIDED THE ISSUES.

Petitioners offer two reasons for granting *certiorari*: 1) the decisions below are clearly erroneous when evaluated under standards adopted by other state courts; and 2) the decisions below are clearly erroneous when applying standards employed by Texas criminal courts. Applying either, the trial court's evaluation of the legitimacy of respondents' race-neutral explanations was correct. In fact, the analysis is virtually identical under standards adopted by Texas or standards adopted in state court decisions cited by petitioners.

A. Petitioners Urge State Court Standards Apply to Strike Explanations.

Petitioners rely primarily on a Florida Court of Appeals' decision articulating five factors that suggest a proffered race-neutral explanation may be pretextual. *Slappy v. State*, 503 So.2d 530 (Fla. Dist. Ct. App. 1987), *aff'd*, 522 So.2d 18 (Fla.), *cert. denied*, 487 U.S. 1219 (1988).[6] Five similar factors have been em-

[6] Petitioners also misguidedly rely upon factors articulated by the Alabama Supreme Court in *Ex Parte Branch*, 526 So.2d 609 (Ala. 1987). The ten factors articulated therein are described as types of evidence that may raise the inference of discriimnation. 526 So.2d at 622-623. Thus, the *Ex Parte Branch* factors are relevant to the first prong of the *Batson* analysis, the *prima facie* case of discrimination, rather than the third prong of the analysis, the determination of discriminatory intent. The other cases cited by

ployed by the Texas Court of Criminal Appeals to evaluate the legitimacy of peremptory challenge explanations. *Whitsey v. State*, 796 S.W.2d 710 (Tex. Crim. App. 1989).[7] Both courts noted or implied that the lists are not exclusive. 796 S.W.2d at 713; 503 So.2d at 355.

B. The Test of Constitutionality Is Discriminatory Intent.

The ultimate constitutional test is whether an "invidious discriminatory purpose" may be inferred from a totality of the relevant facts. *See Washington v. Davis*, 426 U.S. 229, 242 (1976). The relevant inquiry is whether the movant proved discriminatory intent or purpose. "Discriminatory purpose . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decision maker . . . selected . . . a particular course of action at least in part 'because of' not merely 'in spite of' its adverse effects upon an identifiable group." *Hernandez*, 111 S.Ct. at 1866.

To determine intent, the fact finder must assess the proffered explanation in light of all evidence relevant to intent. *United States v. Alvarado*, 951 F.2d 22 (2nd Cir. 1991). Since the explanations underlying the exercise of peremptory challenges are heavily fact dependent, judicial pronouncements that particular reasons are or are not acceptable is difficult, impractical and undesirable. *Id.* at 26. For this reason, the factors articulated by state or federal courts, including the decisions touted by petitioners, are mere guidelines and not express tests. Discrimina-

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petitioners to illustrate standards applied by state courts to evaluate explanations for peremptory challenges pre-date *Batson*. (Petition p. 11).

[7] The Texas Court of Criminal Appeals is the highest court of appeals for criminal matters in Texas. The *Whitsey* factors have not been expressly adopted by the Texas Supreme Court for use in civil cases, but have been used in civil cases by lower courts of appeals. *See Lott v. City of Fort Worth*, 840 S.W.2d 146, 150 (Tex. App. Fort Worth, 1992.)

tory intent must be assessed by the trial court on a case by case basis considering the totality of the circumstances. *Alvarado*, 951 F.2d at 26; *Polk v. Dixie Ins. Co.*, 972 F.2d 83, 86 (5th Cir. 1992); *United States v. Bennett*, 928 F.2d 1548, 1552 (11th Cir. 1991); *United States v. Santopietro*, 809 F. Supp. 1016, 1020 (D. Conn. 1992).

C. Petitioners Had the Burden To Raise and Prove Pretext.

The trial judge must determine, as it did in this case, whether the racially-neutral explanations are contrived to avoid admitting acts of discrimination. *Keeton v. State*, 749 S.W.2d 861, 868 (Tex. Crim. App. 1988). The burden to introduce evidence and to prove pretext is on the moving party—petitioners in this case. *United States v. Guerra-Marez*, 928 F.2d 665, 673, n.9 (5th Cir. 1991), *cert. denied*, 112 S.Ct. 443 (1991); *United States v. Alston*, 895 F.2d at 1374 (11th Cir. 1990) ("when an allegation of pretext is raised the [moving party] bears the burden of convincing the district court that the proffered reasons are pretextual by introducing evidence . . . .").

D. Great Deference Is Accorded the Trial Court's Factual Determination of Intent.

Trial courts have the greatest opportunities to observe the demeanor of parties and venire members and to assess credibility. They are in superior positions to evaluate the degree to which a prospective juror manifests the attribute asserted to justify the strike on non-racial grounds, to compare that attribute with similar or identical atributes displayed by other venire members, and to evaluate the veracity of the attorney who exercised the strikes. Accordingly, this Court has mandated that great deference be accorded trial courts' factual determinations of discriminatory intent and has not required uniformity of the specific procedural mechanisms employed to reach a determination. *Hernandez*, 111 S.Ct. at 1869.

E. Applying Standards Urged by Petitioners, the State Courts' Findings Were Correct.

The factors relied upon by the Florida and Texas courts in *Slappy* and *Whitsey* include: 1) the reason given for the peremptory challenge is not related to the facts of the case; 2) there was a lack of questioning or meaningful questions to the challenged jurors; 3) persons with the same or similar characteristics as the minority juror were not challenged; 4) disparate examinations of members of the venire; and 5) an explanation based on group bias where the group trait is not shown to apply to the challenged jurors specifically. *Whitsey*, 796 S.W.2d at 713-714; *see also Slappy*, 503 So.2d at 355. Similar factors have been employed by federal tribunals to assess discriminatory intent. *Batson*, 476 U.S. at 93 (disparate impact); *United States v. Cobb*, 975 F.2d 152 (5th Cir. 1992); *Reynolds v. Benefield*, 931 F.2d 506 (8th Cir. 1991); *Walton v. Capari*, 916 F.2d 1352, 1361-62 (8th Cir. 1990).

Applying the *Whitsey-Slappy* factors, petitioners complain that respondents' conduct is suspect in the following ways: (a) the absence of questions to Mr. Ayala and Mrs. Baker; (b) Mr. Ayala and Mrs. Baker are not identified in voir dire records; (c) Mr. Ayala and Mrs. Baker were not challenged for cause; (d) respondents did not strike a non-minority juror with allegedly similar characteristics to Mrs. Baker; (e) the group bias or trait alleged to support the strike against Mrs. Baker was not shown to specifically apply to Mrs. Baker; (f) the voir dire record does not substantiate the common basis for striking Mr. Ayala and Mrs. Baker because "they were the only two people to decline to raise their hand indicating that they could be fair and impartial." (Petition p. 11).

Petitioners' arguments ignore the established burdens of proof placed on each party at each individual step of the *Batson* analysis, mischaracterize the facts, misconstrue application of the *Whitsey* factors, and disregard the

ultimate test of discriminatory intent measured by reference to the totality of circumstances. In the final prong of the *Batson* analysis, the trial court must determine whether the peremptory challenges were exercised with discriminatory intent. *Batson*, 476 U.S. at 98. The burden of proof and persuasion to show discriminatory intent is upon the moving party (petitioners). *Id.* at 94, n.18; *see also Jones v. Jones*, 938 F.2d 838, 844 (8th Cir. 1992). Explanations that are facially race-neutral are deemed to be race-neutral. *Hernandez*, 111 S.Ct. at 1866. Pretext must be raised and proved by the party complaining that peremptory challenges were used improperly (petitioners). *United States v. Guerra-Marez*, 928 F.2d 665, 673 (5th Cir. 1991), *cert. denied*, 112 S.Ct. 443 (1991); *United States v. Alston*, 895 F.2d 1362, 1367 (11th Cir. 1990). Therefore, once respondents articulated facially race-neutral reasons for their peremptory strikes, the burden shifted to petitioners to controvert respondents' race-neutral reasons.

Petitioners failed to meet this burden of proof or persuasion. They did not attempt to argue or explain to the trial court how respondents' race-neutral reasons were inadequate based upon the factors articulated in *Whitsey*, *Slappy*, or otherwise. They did not contend that the race-neutral reasons offered by defense counsel were pretextual; and they offered no argument or evidence related to pretext. (S.F. 66-78). The trial court correctly concluded that petitioners did not meet their burden to prove discriminatory intent. Moreover, applying the factors urged by petitioners and articulated in *Slappy* or *Whitsey*, respondents' race-neutral explanations survive scrutiny.

1. ***Questions were directed to all the venire members, including Ayala and Baker.***

Petitioners complain that no questions were directed to Mr. Ayala and Mrs. Baker and argue that failure to ask individual follow-up questions to the challenged venire members is suspect. They also argue that absent ques-

tions specifically directed to challenged venire members, the race-neutral reasons proffered by defense counsel are illegitimate under the test pronounced in *Whitsey*, 796 S.W.2d at 713-714.

Petitioners erroneously equate the absence of verbal responses *from* Mr. Ayala and Mrs. Baker with an absence of meaningful questions directed *to* these jurors. During voir dire, the parties requested that all venire members respond to questions by raising their hands. In this manner, all prospective jurors were questioned regarding their ability to weigh the evidence and impartially reach a determination on the ultimate issues in the case. (S. F. 51-52, 77). These questions were directed to each and every member of the venire. Each and every member of the venire was expected to answer by show of hands. (S.F. 51). Specifically, Mr. Freeman said, "Can I see a show of hands of *everyone* that can hold plaintiffs to their burden of proof? *Everyone* raise their hand that can do that." (S.F. 51), (emphasis added.) It is uncontroverted that Mr. Ayala and Mrs. Baker responded negatively to both questions by declining to raise their hands. (S.F. 73-77). They were unable or unwilling to commit to this impartiality.

Petitioners suggest that respondents were obligated to confirm that Mrs. Baker and Mr. Ayala "intentionally" failed to raise their hands. Having learned of Mr. Ayala's and Mrs. Baker's potential bias against defendants, respondents were under no obligation to question these prospective jurors further. *See United States v. Grandison*, 885 F.2d 143, 147 (4th Cir. 1989), *cert. denied*, 110 S.Ct. 2178 (1990). Addressing the issue of follow-up questions, the Fourth Circuit held:

> "A balance must be struck between fair jury selection procedures and the need to move promptly toward trial. The decision not to ask follow-up questions is a matter of trial strategy; failure to do so is not dispositive of the thoughtfulness of the . . . exercise of

> peremptory strikes. Indeed, no genuine need for follow-up questions may exist."

Grandison, 885 F.2d at 147. Here, Mr. Ayala's and Mrs. Baker's nonverbal responses revealed an unwillingness or inability to follow the law. Nothing was to be gained by further questioning.

Furthermore, petitioners misguidedly rely on *Esteves v. State*, 845 S.W.2d 291 (Tex. Civ. App. — Houston [1st Dist.] 1992), *vacated and remanded*, 849 S.W.2d 822 (Tex.Crim.App. 1993) for the proposition that proffered race-neutral explanations for strikes cannot be accepted where questions are not directed to the individual venire members. In *Esteves* the explanation for the strike was nonverbal behavior (yawning) unrelated to inquiries posed to the venire. The proponents of the *Batson* challenge introduced evidence that other non-minority jurors who exhibited similar behavior were not challenged. The Court of Criminal Appeals found the lack of questions directed to this individual juror to be significant because other jurors had exhibited similar behavior, and had not been challenged.

In the case at hand, the challenged jurors were questioned, along with all members of the venire, regarding matters particularly relevant and meaningful to the case to be tried. Petitioners offered no evidence to rebut the proffered race-nentral reasons. Therefore, *Esteves* is not controlling, persuasive or even helpful to the analysis of the case before this Court. The trial court supervised the voir dire, observed the testimony by respondents' counsel and was in the best position to evaluate the veracity of respondents' counsels' testimony that Mr. Ayala and Mrs. Baker failed to respond affirmatively to these crucial voir dire questions. *See Hernandez*, 111 S.Ct. at 1856; *see also Vargas v. State* 838 S.W.2d 552, 554 (Tex. Crim. App. 1992).

The state courts of appeals correctly deferred to the trial court's perception of the evidence and concluded

respondents' race-neutral explanations were sufficient. (Appendix A-6.) Indeed, a contrary conclusion would require the courts below to ignore the trial court's determination of credibility and veracity of attorneys' testimony regarding events that transpired in the trial judge's presence. Such a conclusion is not permissible under the applicable clear and erroneous standard of review. *Hernandez,* 111 S.Ct. at 1869.

2. The absence of juror names in the voir dire record does not support reversal.

For the first time on appeal before the Texas Supreme Court, petitioners complained that "the only two Hispanics on the jury panel . . . are not identified in the voir dire record . . ." and that "[n]either of these Hispanic venire members are identified by name in the voir dire record." Similar complaints are made before this Court. (Petition, p. 11.) Petitioners present no briefing before this Court and did not argue to the courts below that the absence of the challenged venire members' names from the voir dire statement of facts defeats respondents' evidence of race-neutral reasons for the strikes.

Furthermore, petitioners' complaint is misleading with respect to the state of the record. While Mrs. Baker's and Mr. Ayala's names do not appear in the statement of facts of the voir dire, they are identified by name in the record by testimony of respondents' counsel setting forth race-neutral reasons for the peremptory strikes against these two jurors and by the judge at the inception of the *Batson* hearing. (S.F. 67-78). The testimony of Mr. Scully and Mr. Freeman identifies the jurors by name and attributes specific responses, verbal and nonverbal, to Mr. Ayala and Mrs. Baker. Petitioners did not object to this testimony and did not offer any controverting testimony suggesting that Mr. Scully's and Mr. Freeman's testimony was incorrect or untruthful or that the juror responses referred to by Mr. Scully and Mr. Freeman were made by venire members other than Mr. Ayala or

Mrs. Baker. The mere absence of Mrs. Baker's and Mr. Ayala's names from the transcript of the voir dire proceedings is not evidence that respondents' peremptory strikes were racially-motivated.

3. *Respondents were not obligated to challenge Mr. Ayala or Mrs. Baker for cause.*

Petitioners argue somewhat nonsensically that the race-neutral reasons for respondents' strikes comprise bias or prejudice that would have disqualified both jurors as a matter of law. (Petition p. 15.) They reason that, since respondents would have "automatically been entitled to strike" Mrs. Baker and Mr. Ayala, their failure to challenge these jurors for cause and obtain the alleged "automatic" exclusion is evidence that the peremptory strikes exercised against these same jurors was racially-motivated.

Essentially, petitioners concede that Mr. Ayala and Mrs. Baker should have been removed from the jury, but complain that it was erroneous to allow their removal by peremptory challenge rather than for cause. Petitioners do not explain how they were harmed by Mr. Ayala and Mrs. Baker being peremptorily removed from jury service rather than "automatically" excluded for cause. Similarly, petitioners offer no explanation how Mr. Ayala's and Mrs. Baker's equal protection and due process rights have been violated, since under petitioners' theory both would have been "automatically" excluded for bias or prejudice.

Petitioners' argument that there is an obligation to move to strike the venire members in question for cause instead of exercising peremptory challenges against such jurors is not the law—and for good reason. The purpose of voir dire is to develop information, verbally and non-verbally, in order to challenge specific venire members either peremptorily or for cause. The very existence of peremptory challenges recognizes the value of permitting litigants to challenge prospective jurors for reasons other

than "cause." Implicit in this process is a recognition that voir dire is an integral part of the trial. *See Batson*, 476 U.S. at 99, n.20. An attorney's strategy does not begin with opening statement, but rather begins with voir dire, because it is at that moment that prospective jurors are first exposed to the facts and issues of the case through the attorneys' questions and representations regarding the anticipated evidence. Every statement and every question made by counsel during voir dire ultimately impact the outcome of the trial.

For this reason, most trial lawyers engage in a cost/benefit analysis on behalf of their clients in deciding what questions to ask, whether to ask questions to specific members of the panel and whether to pursue or expand sensitive lines of questioning. Once an unfavorable or potentially unfavorable response is elicited, counsel may strategically determine to exercise a peremptory challenge on that juror rather than inviting the juror to expound on his unfavorable and most likely prejudicial views to the remainder of the venire.

Petitioners essentially suggest that each venire member must be questioned individually, specifically, and extensively regarding unfavorable responses and that all possible challenges for cause must be explored and exhausted before that venire member may be challenged peremptorily. This argument is unsupported and should be soundly rejected. To require a party to unnecessarily ask questions of the venire, when enough information has been gathered to legitimately and rationally exercise challenges, would severely compromise a party's ability to strategically "sit down and shut up." *See United States v. Grandison*, 885 F.2d 143, 147 (4th Cir. 1989) *cert. denied* 110 S.Ct. 2178 (1990). This is especially true when, as in this case, the court requires all questioning to be conducted before the entire panel.

The propriety and value of peremptory challenges were explicitly recognized by this Court in *Batson, Edmonson*

and *Hernandez*. In *Batson*, this court held that the traditional peremptory challenge process would not be intruded upon absent some reason to believe that discrimination might be at work. *Batson*, 476 U.S. at 99, n.20, In all three cases, the court had an opportunity to rule that peremptory challenges are unconstitutional. Instead, the court held only peremptory challenges exercised for improper racially motivated reasons to be improper. Admittedly, there is a delicate balance between the use of peremptory challenges and the protection of important constitutional rights. However, this Court's prior decisions in *Batson*, *Edmonson* and *Hernandez* and their progeny, effectively define this balance. Such balance was properly maintained here.

Petitioners' argument amounts to nothing more than an attempt to attack the credibility of the attorneys, Mr. Scully and Mr. Freeman, who testified as to their race-neutral reasons for striking Mrs. Baker and Mr. Ayala. By suggesting that Mrs. Baker and Mr. Ayala were subject to challenges for cause that were not brought by respondents, petitioners attempt to cast dispersion on the credibility of Mr. Scully's and Mr. Freeman's testimony. A proper vehicle to make such a misguided attack was through cross-examination in the trial court at the *Batson* hearing. Having declined to cross-examine Mr. Scully and Mr. Freeman before the fact finder, petitioners' efforts to attack Mr. Scully's and Mr. Freeman's credibility through illusion and implication and to raise issues of pretext should be soundly rejected.

The best evidence of the legitimacy of respondents' race-neutral explanations was the credibility and demeanor of Mr. Scully and Mr. Freeman at the time of the *Batson* hearing and the trial court's observations of the venire and the voir dire. *Hernandez*, 111 S.Ct. at 1869. The trial court's trust and belief in the testimony of these attorneys should not be disregarded based solely upon petitioners' unfounded and unsubstantiated assertions.

In sum, there is no authority to support petitioners' argument that all possible challenges for cause must be exhausted before a party may exercise a peremptory strike. There is, likewise, no authority that failure to exhaust all challenges for cause against a juror who is ultimately peremptorily struck comprises evidence that the peremptory strike was racially motivated.

4. Exercising a peremptory strike against Mrs. Baker based upon her employment was proper.

Respondents' explanation that they believed Mrs. Baker would be biased against the defendant osteopathic physicians because she had attended medical classes and was employed by a medical doctor rather than an osteopath supported the state courts' holdings of "no purposeful discrimination." The statement of facts reflects Mrs. Baker's statement that she is employed by gynecologists, but does not specify that her employers are allopathic, rather than osteopathic physicians. (S.F. 27-28). Mr. Scully's testimony reveals that he believed Mrs. Baker to be employed by allopathic physicians when respondents exercised their peremptory challenges. This error in recollection does not affect the neutrality of his strike explanation since the determinative inquiry is discriminatory *intent*. Intent should not be inferred from an inadvertent error. *See Guerra-Marez*, 928 F.2d at 673 (holding that erroneously attributing wiretap criticism to juror does not negate a race-neutral explanation or infer discriminatory intent).

Petitioners mischaracterize the peremptory strike exercised against Mrs. Baker as being based upon a trait attributed to her solely by virtue of her membership in a particular group. In fact, the basis for the strike was Mrs. Baker's experience and employment, factors which courts have held to be racially neutral. *United States v. De LaRosa*, 911 F.2d 985 (5th 1990), *cert. denied*, 111 S.Ct. 2275 (1991), *Dasco v. State*, 739 S.W.2d 437 (Tex. App. — Houston [14th Dist.] 1987, pet. ref'd.);

Johnson v. State, 740 S.W.2d 868 (Tex. App. —— Houston [14th Dist.] 1987, pet. ref'd.). This basis alone is sufficient to support the trial court's ruling and appellate courts' affirmance. *See United States v. Lance*, 853 F.2d 1177, 1181 (5th Cir. 1988).

Furthermore, petitioners misunderstand or misapply the "group trait" prong of the *Whitsey* analysis. Prohibition of strikes based on group traits discussed in *Whitsey* and in *Slappy* are traits that have a relationship to race. The perceived danger is that parties will make race-related assumptions and strike minority jurors without first establishing that the trait applies to the juror, thereby accomplishing indirectly what *Batson* prohibits directly. *See Hernandez*, 111 S.Ct. at 1867; *see also United States v. Brown*, 817 F.2d 674 (10th Cir. 1987); *United States v. Woods*, 812 F.2d 1483 (4th Cir. 1987). The "group trait" in question here, if it can be fairly called that, bears no relationship to race.

Petitioners also assert that respondents' explanation of this strike must be supported by evidence in the record that Mrs. Baker actually harbors a bias against osteopathic physicians. The cases cited by petitioners, however, do not impose such a heavy burden on one resisting a *Batson* challenge. *See Whitsey*, 796 S.W.2d at 707; *Emerson v. State*, 851 S.W.2d 269 (Tex. Crim. App. 1993). Furthermore, there is no requirement that race-neutral reasons be supported by evidence in the record. *United States v. Cobb*, 975 F.2d 152, 155 (5th Cir. 1992). Rather, the test is whether the trial court's credibility assessment is clearly erroneous. *Id.* The burden to create a record of relevant facts is on the party challenging the strike. *See United States v. Esparsen*, 930 F.2d 1461, 1466 (10th Cir. 1991), *cert. denied*, 112 S.Ct. 882 (1992); *see also United States v. Dawn*, 897 F.2d 1144, 1148 (8th Cir. 1990), *cert. denied*, —— U.S. ——, 111 S.Ct. 389 (1990); *Sangineto-Miranda*, 859 F.2d at 1520.

5. Respondents' decision to strike a former medic was not disparate treatment.

Petitioners argue that the fact that respondents did not strike Armand Auger, a venire member who had served as a medic in Vietnam almost thirty years ago, in 1962 through 1964, is evidence that Mrs. Baker was disparately treated because Mr. Auger was a person with the same or similar characteristics as Mrs. Baker. Of six persons on the venire who testified during voir dire that they or their spouses had professional contact with the medical profession or had medical training or experience, only Mr. Auger was ultimately seated on the jury. (S.F. 24-28, 44-46, 78). Mr. Auger had been a medic in Vietnam twenty-eight years before and had had no medical experience since that time. (S.F. 24). Mr. Auger himself, when asked whether his background as an army medic would in any way influence his listening to the medical evidence in the case, stated that it would not and volunteered that "it is a different type of environment—of a working relation." (S.F. 24-25).

A person who attends medical classes and currently works at a medical clinic is obviously in a different posture from a person who had experience as a combat medic twenty-eight years before and no subsequent contact with the medical profession since. Disparate treatment of venire members is a factor to consider in evaluating the legitimacy of a race-neutral explanation only when the disparately treated venire members are in the same or similar circumstances. The state trial and appellate courts correctly concluded that the medical experiences of Mrs. Baker were not sufficiently similar to those of Mr. Auger to support a finding of disparate treatment.

Moreover, even if the characteristics of Mr. Auger and Mrs. Baker can be said to be similar, a strike does not automatically become racially based just because the striking party fails to strike another juror who shares the same characteristics as a minority juror who is challenged.

United States v. Alvarado, 951 F.2d 22, 25 (2nd Cir. 1991); *Green v. State*, 839 S.W.2d 935, 939 (Tex. App. — Waco 1992, pet. ref'd). Factors recognized to weigh against the legitimacy of race-neutral explanations are only analytical tools to determine whether the court's findings are clearly erroneous. *Id.* They are not to be used to evaluate the striking attorney's credibility. *Id.* They do not control the trial court's decision on whether a strike is racially based. *Vargas*, 838 S.W.2d at 554.

Respondents' failure to strike one of six venire persons who arguably had similar characteristics to Mrs. Baker does not reflect disparate treatment. *See Alvarado*, 951 F.2d at 25. Moreover, respondents articulated valid race-neutral reasons for striking Mrs. Baker other than her medical employment and education. (S.F. 74-75). Specifically, Mrs. Baker's responses to crucial questions regarding her ability to neutrally weigh the evidence and find for defendants, if the evidence should so demand, suggested bias, prejudice and partiality. Additional reasons for the strike other than the reason shared with a non-minority juror enhance the credibility of the race-neutral explanations for peremptory challenges. *See Lance*, 853 F.2d at 1181; *United States v. Lewis*, 837 F.2d 415, 417, n.5 (9th Cir. 1988), *cert. denied*, 488 U.S. 923 (1988).

6. *There is evidence in the voir dire record to substantiate the common basis for striking Mr. Ayala and Mrs. Baker.*

Petitioners' assertion that there is "no voir dire record to substantiate the common basis for striking both Hispanics—that they were the only two people on the jury panel who refused to raise their hand in response to questions as to whether or not they could be fair and impartial" (Petition p. 11) is incorrect. It misstates the evidence and ignores applicable burdens. Mr. Scully and Mr. Freeman both testified that Mr. Ayala and Mrs. Baker gave unfavorable nonverbal responses to questions

directed to the entire panel regarding ability to impose the proper burden of proof, ability to find for defendants based upon the evidence and ability to distinguish between real life and lawsuit damages. Additionally, Mr. Scully testified that Mr. Ayala's conduct during voir dire appeared to favor petitioners. (S.F. 75). A juror's attitude toward a party or attorney manifested by gestures or facial expressions may be an appropriate basis to exercise a peremptory challenge and does not automatically infer discriminatory intent. *See Reynolds v. Benefield*, 931 F.2d 506, 512 (8th Cir. 1991) (valuable information can be obtained by observing juror's demeanor); *United States v. Hendrieth*, 922 F.2d 748, 749 (11th Cir. 1991).

In this argument, Petitioners belatedly imply that the race-neutral explanations made by Mr. Scully and Mr. Freeman were pretextual. They failed in the trial court to offer evidence or argument to controvert Mr. Scully's and Mr. Freeman's testimony regarding the challenged jurors voir dire responses and conduct. Similarly, there is no evidence in the record regarding undesirable responses from the venireman or that respondents failed to exercise peremptory challenges against non-minority jurors who provided similar responses. The party complaining that a peremptory challenge has been exercised in a racially-motivated manner has the burden to prove discriminatory intent. *Batson*, 476 U.S. at 98. The burden to prove pretext is, likewise, on the party complaining of the peremptory challenge. *Guerra-Marez*, 928 F.2d at 673 n.9; *Alston*, 895 F.2d at 1374. Petitioners did not present argument or evidence related to alleged pretext at the *Batson* hearing. They failed to controvert the race-neutral explanations given by respondents in any manner whatsoever. Thus, the only thing absent from the record is evidence to support petitioners unfounded allegations of discrimination.

CONCLUSION

Petitioners request this Court to reevaluate factual determinations of a state trial court that have been upheld by state appellate courts. Although the fact findings in question implicate a federal constitutional right, the courts below carefully considered and correctly decided the issues. The Petition does not raise issues sufficiently important to warrant this Court's review. The trial judge had an opportunity to observe the demeanor and testimony of the witnesses. He concluded that respondents' strike explanations were facially race-neutral and that petitioners had failed to prove respondents' strikes were intentionally discriminatory. The state appellate courts correctly deferred to the trial court's perception of the evidence and held that respondents' reasons for striking Mr. Ayala and Mrs. Baker were not intentionally discriminatory.

For these reasons, the Petition for Writ of *Certiorari* should be denied.

Respectfully submitted,

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